“Supercharging Your Forensic Accounting Skills”

Presented by

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Learning Objectives

• Understand types & roles of witnesses
• Learn how to avoid Daubert Challenges
• Enhance oral testimonial skills
• Acquire incontrovertible evidence
• Learn how to preserve privileges
• Adopt good reporting practices
“Most criminals today are not calculating masterminds, but short-sighted opportunists guided more by impulse than logic.”

Jef Nance, CFE, in
Conquering Deception

**Forensic Definition**

"Forensic" refers to engagements
- "suitable for use in a court of law…
- that result from actual or anticipated disputes or litigation".
WITNESSES

Fact Witness

• Often internal auditor or employee
• Presents direct or circumstantial evidence
• Subject to subpoena
• Can authenticate evidence
• Reports facts not opinion

**Cynthia Cooper (WorldCom)**
Consultant/"Challenge" Consultant

- Conducts investigation/provides technical assistance
- Findings subject to subpoena
- May serve as advocate for retaining counsel
- Does not testify

Expert Witness

- Assists “trier of fact” to understand facts
- Is independent
- Authentiﬁes evidence
- Subject to subpoena for testimony
- Prepares report of ﬁndings & opinion
- Subject to depositions, direct & X- exams
DAUBERT CHALLENGES

Expert Witness-Testimony (Daubert)

May present opinion if testimony

- is based on sufficient facts of data
- is product of reliable principles & methods, and
- witness has reliably applied principles & methods to case facts
**Expert Witness-Testimony (Daubert)**

- Challenge – Simple
  - Pretrial hearing

- Challenge – Complex
  - Launched during trial
  - Potential for summary judgment if successful

**What could cause testimony to be challenged?**

- “Experts” training/experience is inadequate
- CV contains inconsistencies
- Opinion(s) lack foundation
- Investigation/report is biased
- Evidence is not incontrovertible
- Other theories not considered
What could cause testimony to be **challenged**?

- Report & deposition inconsistent
- Report is “sloppy” or contains errors
- Report format does not meet standards
- “Chink” in armor perceived
- Opportunity to “rattle” witness

What could cause testimony to be **challenged**?

- Testimony is “extremely” critical
- Push for summary judgment
- Opposing counsel stalling for time
- Evidence appears “cherry picked”
- Report sources are unauthoritative
TESTIMONIAL SKILLS--
DEPOSITIONS, DIRECT &
CROSS EXAMINATION

Why do less than 5% of civil cases go to trial?

- Settlement encouraged outside of courts
- Adverse publicity
- Trials are expensive
  - Legal fees
  - Disruption to normal workflows
- Often no recovery
Credibility

- “Credibility is a basic survival tool.”
  …Rebecca Solnit
- “Trust is built on credibility and credibility comes from acting in other people’s interest before your own.” …Stephen Denny
- “Consultants have credibility because they are not dumb enough to work at your company.” …Scott Adams

Deposition Testimony

- Fishing expedition
- Attempt to find “chinks in the armor”
- Search for scope of your opinions
- “Lock in” witnesses’ testimony for impeachment at Trial (laying foundation)
- Opportunity to assert “Daubert Challenge”
Deposition Testimony - Types of Questions

1. Basis of each opinion
2. Consideration of other methods or information
3. Education & experience
4. Certifications
5. Any questions related to Expert’s report

6. Disagreements w/ opposing Expert’s opinions
7. Compensation
8. Time devoted to case
9. History of cases previously worked
10. Publications/seminars in last 10 years
Deposition tricks & strategies

• Waive rights to correct deposition ("errata sheet")
• Encouraging witness to teach
• Asking open ended questions
• Asking compound questions
• Asking questions to "pick at" witness

Deposition tricks & strategies

• Frequently changing topics to confuse witness
• Rendering silence to coax witness to talk
• Conducting lengthy depositions
Deposition-counsel assistance

- Preparation prior to deposition
- Objections: Evidentiary & Procedural
  - Repeated questions already answered
  - Argumentative & irrelevant questions
  - Questions that are speculative

Deposition-counsel assistance

- Objections: Evidentiary & Procedural
  - Ambiguous/vague type questions
  - Conduct of the inquisitor
  - Evidence presented
  - Qualifications of person taking deposition
Deposition-counsel assistance

- Instructions not to answer questions
  - Asserting privileges
    - Client/Attorney
    - Work product
  - Anticipated motion for protective order
  - Enforcement of order made by Court

Trial Testimony

- Opening statements
- Direct examination
- Cross-examination
- Re-direct
- Re-cross
- Summary statements
**Trial Testimony**

- Scripted by opposing counsel
- Opportunity for witness to teach jury
- Another opportunity for “Daubert Challenge”
- “Hardball”
- Closed questions directed to Expert Witness

**Cross-examination tricks**

- Attacks for lack of specific credentials
- Attacks on sufficiency of investigation
- Mischaracterizations in questions
- Taking statements out of context
Cross-examination tricks

- Demonstrating witness is biased
- Attacks on witness’s knowledge of facts
- Focusing on other potential causes
- Pushing witness into defensive posture

Communicate with trier of fact

- Know your case
- Prepare to teach
- Use analogies that are clear
- Use precise and clear language
Communicate with trier of fact

- Look directly at trier of fact when answering
- Be yourself & be confident
- Do not be overly technical
- Do not “talk-down” to trier of fact
- Use clear and simple visual charts
Evidence—Standards of Proof

- Civil Cases
  - Preponderance of the evidence
    - “More likely than not”

- Criminal cases (higher standard)
  - Beyond a reasonable doubt
Forms of Evidence

- Testimonial (Oral)
- Real/physical
- Demonstrative (Illustrative)

✓ Forensic accountants use all 3.

Evidence - What is it?

Information that can prove or disprove an assertion or fact:

- Direct
- Indirect/Circumstantial
Evidence-Direct

The truth is supported without need of additional evidence or intervening inference. (e.g. Eye Witness)

Evidence-Circumstantial

- Inference required to connect it to conclusion of fact (e.g. fingerprint)
- Evidence accumulates into a collection of
  - Pieces that become corroborative
  - Evidence becomes more valid as proof of fact when alternative explanations are ruled out
    - “Keep adding on the bricks”!!
Evidence-Circumstantial

- Used in criminal courts to establish guilt/innocence through reasoning
- Used in civil courts to establish or refute liability

Validity of Circumstantial Evidence
- Comes from a variety of sources
  - Multiple sources check & reinforce each other

Often more powerful than Direct Evidence
- Eye witness testimony can be inaccurate
Evidence—Incontrovertible

Evidence so conclusive there can be no other truth…no other possible explanation

Evidence—Best Evidence Rule

• Originals are primary to prove content
• Copies secondary (acceptable if originals destroyed/unavailable)
• Must be authenticated ("proven to be genuine") by
  • Witness with personal knowledge
  • Expert witness
Evidence-Chain of Custody

- Purpose: “Authentication”
  - Preserve evidence from collection to presentation in court
  - Establishes evidence source & security against alteration

Evidence-Chain of Custody

- Process
  - Create document identifying item(s) (description)
  - Where it was found & # of pages
  - Note condition of documents as received
    - Erasers & white-out
    - Completeness of documents (missing items)
**Evidence-Chain of Custody**

- Process
  - Reflect dates received & who transferred it to your possession
  - Fix control # (Bates Stamp) as gathered

**Evidence-Authentication (Fed Rule 901)**

- Testimony that the item is what it is claimed to be
  - Lays foundation
    - “…sufficient preliminary evidence of the authenticity and relevance for admission of material evidence…”
  - Material evidence
    - “…important evidence that may serve to determine the outcome of the case.”
Evidence—Authentication

- Requires an “authenticating” witness
  - Percipient witness (“Eye” witness)
  - Police officer finding evidence
  - Expert who
    - Examined evidence to lay foundation for admission
    - Determines evidence has all properties expected if evidence would be expected to have if authentic

Evidence—Authentication

No authentication required for admission if
- Public records (Certified copies)
- Official government documents
- Notarized documents
- Periodicals (e.g. Bus Week, WSJ, etc.)
Evidence: Documents & Workpapers

- Workpapers & report serve as basis of testimony
- Never mark original documents
- Segregate originals and indicate as “original”
- Work with copies
- Cross reference sources of evidence

Evidence—Documents & Workpapers

- Use document protectors
- Do not alter documents or destroy
- Number copies (Bates/Rogers stamp)
- Establish chain of custody
Evidence: Documents & Workpapers

Workpapers stand on their own

- Not documented…it never happened
- Create “tick marks” w/explanation
- All workpapers must be available & ready
  - Summaries to lowest level of subsidiary W/Ps
  - Organized & legible
  - Stored in protected location

Evidence-Documents & Workpapers

Other types of documents may include:

- Depositions & pleadings
- Photos, G/L, journals, JE, Invoices, etc.
- Interview notes, recordings (audio/video), confessions
- Email, computer files, public records
Federal Rules of Evidence

• Definition of relevant evidence—401
• Relevant evidence admissible—402
• Exclusion of evidence—403

Evidence-Relevant (Rule 401)

• Evidence will be relevant if
  • “it has any tendency to make a fact more or less probable than it would be without the evidence; and
  • the fact is of consequence in determining action.”
Evidence-Admissibility (Rule 402)

• Evidence is admissible unless proven otherwise by
  • US Constitution
  • Federal statute
  • Federal Rules of Evidence or
  • Other rules prescribed by the Supreme Court

Evidence-Admissibility (Rule 402)

• Legally obtained, preserved & handled
• Relevant
• Materially contribute
• Timely
• “Probative value”—tending to prove
  • Probative evidence “seeks the truth”.
  • Evidence that is not probative is inadmissible
Evidence-Excluded (Rule 403)

Excluding evidence for:

- Unfair prejudice
- Confusion of the issues
- Misleading the jury
- Undue delay
- Waste of time
- Needlessly presenting cumulative evidence

Evidence--Admissibility

- Warrant-search & seizure
  - Demonstrate probable cause
  - Evidence of existence
  - Where evidence likely to be located

- Exceptions
  - Plain view
  - Consent
  - Exigency (warrantless search)
Evidence-Rules of Evidence

- Opinion Testimony by Lay Witnesses—701
- Witness Testimony by experts—702
- Basis of opinion by experts—703
- Opinion on ultimate issue—704
- Disclosure of facts or data—705

Evidence-Rules of Evidence (701)

- Opinion Testimony by Lay Witnesses
  - Not based on scientific, technical or other specialized knowledge
  - Used to determine the facts
  - Based on witness’s perception
Evidence-Rules of Evidence (702)

- Opinion Testimony by Expert Witnesses
  - Based on scientific, technical or other specialized knowledge
  - Product of reliable principles & methods applied to the facts of the case

Evidence-Rules of Evidence (703)

- Basis of Opinion by Expert Witnesses
  - Opinion based on facts or data the expert has discovered or observed
Evidence-Rules of Evidence (704)

- Opinion on an Ultimate Issue
- Opinion is not automatically objectionable because it embraces an ultimate issue
- Example: “The expert witness cannot make a statement addressing the issue of whether the legal test for insanity has been met” **

**Wikipedia (def)

Evidence-Rules of Evidence (705)

- Disclosing Facts or Data Underlying an Expert's Opinion
- Expert may state opinion without first testifying to the underlying facts or data
Evidence-Rules of Evidence (706)

• Court Appointed Expert Witnesses
  • Expert’s role
    - Must disclose findings
    - May be deposed
    - Subject to cross examination by either party

Evidence-Excluded Hearsay

“…information gathered by one person from another person concerning an event, condition, or thing of which the first person had no DIRECT experience.”

• Rule 801, 802 & 803- “Hearsay & Exceptions”
Evidence-Hearsay Exceptions

- Past recollection recorded (Police report)
- Spontaneous statement ("blurts out")
- Party involved confirms statement
- Records of business (foundation laid)

Evidence-Hearsay Exceptions

- Party admits to accuracy of statements
- Business records
- Prior consistent or inconsistent statement
- Dying declarations
Discovery-Federal Rules of Civil Procedure (26-37 & Rule 45)

- Rule 33: Interrogatories to parties


Discovery-ESI (Rule 34)

Conference [Rule 26 (f)] Report

- Litigation Hold (prevent spoilage of ESI) procedures for ESI to be acquired
- Personnel involved
- Time period
- Areas of agreement & disagreement
- Format, structure, servers, location, etc.
- Relevancy of data
Discovery-ESI (Rule 34)

• Who pays for discovery?
  • Rowe Entertainment v. William Morris Agency
  • Murphy Oil USA, Inc. v. Fluor Daniel, Inc.
    • Multi-factor tests- 8 factors

• Zubalake v. UBS Warburg, LLC
  • Multi-factor tests- 7 factors

Discovery-Federal Rules of Civil Procedure (26-37 & Rule 45)

• Rule 35: Physical & Mental Examination
• Rule 36: Requests for Admission
• Rule 37: Failure to Make Disclosures/Cooperate (“Motion to Compel”)
• Rule 45: Subpoena
Privileges & Protections
(Rule 501)

Protected/Privileged Evidence

• Privileged/Protective Orders
  • Attorney-Client Privilege
  • Work Product
  • Other protective orders
    • Trade secrets
    • HIPPA regulations
    • Relevancy items in question
Evidence-Privileged

- Attorney-client privilege
  - “Confidential” communications between client & attorney
  - Can be defeated if attorney goes beyond providing LEGAL advice
    - E.g., Attorney performing investigative functions he may be compelled to produce evidence

Evidence-Privileged

- Attorney Work Product Doctrine [Rule 26(b)(3)]
  - Prevents compelled disclosure of “tangible” materials collected in preparation for “anticipated litigation”
  - “tangible” materials—Factual & Opinion
    - Factual product is CONDITIONAL
      - Information/data can’t be obtained w/o hardship elsewhere [Rule 37(a)]
    - Opinion product—"totally” privileged
      - "mental impressions & analysis of case"
Evidence—Privilege Logs

Party claiming privilege has burden of proof

Log must include [Rule 26(b)(5)(A)]

- Description of contents of document
- Date document prepared
- Who prepared document
- Person(s) document was prepared
- Purpose of the document
- Privilege asserted

Evidence—Protective Orders

- Refuge under Rule 26(c) & 26(b)
  - Annoyance
  - Embarrassment
  - Oppression
  - Undue burden or expense
Privileges & Protection--Lost

- Communication between Expert Consultant & Expert Witness
- Disclosure to parties not needing access
- Failure to maintain “Privilege Logs”

Privileges & Protection--Lost

- Expert Consultant testifying as Expert Witness (mental impression will compelled…opinion)
- Trend: All documents/information given to Expert will be disclosed.
- Draft reports are now exempt from discovery
Reports-Conclusions & Opinions

- Expert Witness reports may contain either conclusions or opinions
  - Opinions require interpretation of facts & are permitted
  - Opinions of guilt or innocence are barred!
Report Writing

“If you can’t give a simple explanation, you probably don’t understand it well enough.”

Albert Einstein

Expert Report Writing

Federal Rules (Civil) 26(a)2(b) & Rule 16 (b)(2)(Criminal)

- List parties involved
- Purpose of investigation
- Define scope of the investigation
  - Restrictions/limitations
    - Suspect immunities
  - Time period under investigation
  - Data under investigation
Expert Report Writing
Federal Rules (Civil) 26(a)2(b) & Rule 16 (b)(2)(Criminal)

Description of working environment
• Internal controls description
• Accounting system & software
• Job description
• Access to assets

Methods of investigation used

Methods of investigation & approaches considered

Expert Report Writing
Federal Rules (Civil) 26(a)2(b) & Rule 16 (b)(2)(Criminal)

Authoritative references

Findings/Conclusions/Opinions
• Dollars extracted
• Suspect(s) who executed scheme(s)
• Basis for opinions
  • Schemes utilized
  • Execution of schemes by suspect
Expert Report Writing
Federal Rules (Civil) 26(a)2(b) & Rule 16 (b)(2)(Criminal)

• Exhibits & Expert’s CV (attached)
• Signature by expert witness
• Date of report

Report Writing

• Stay within your area of expertise
• Be truthful
• Do not show bias
• Never put anything in report w/o support
• Verify all elements & rule out “false positives”
• Rule out “fiction”
Report Writing

• Avoid anything that could discredit you
• Do not include jargon & follow KISS rule
• Do not speculate
• Do not attempt to make legal interpretations
• Do not state suspect is innocent or guilty
  • Only state your opinion on the supported facts
  • The “trier of fact” determines guilt or innocence

Report Writing

• Rest a day or more
• Attack it from all sides
• Make adjustments if necessary
• Attack it from all sides
• Review results for final time
• Release report
What should be on your CV?

- Do not provide a resume
  - Leave out hobbies
  - Work style
  - Family members
  - Clubs & religious organizations, etc
- Possess only one current CV
- Be absolutely honest in all matters
- List all cases testified

What should be on your CV?

- List all work experience in sequential date order
- List all publications & seminars taught in last 10 years
- Eliminate inaccuracies
- Do not exaggerate accomplishments